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No. 07-953

In The
Supreme Court of the United States

CITIZENS UNITED, *Appellant,*
v.
FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

Supplemental Brief on Jurisdiction

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Corporate Disclosure Statement

Citizens United has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Argument

The FEC says jurisdiction "is not free from doubt." *Motion to Dismiss or Affirm* ("MDA") 2 n.1. Its argument is based on flawed statutory interpretation, and sound policy supports appellate review.

I. Jurisdiction Exists Because the Three-Judge Court Was "Required by . . . *Congress*."

This Court's jurisdiction is based on the fact that *Congress* "required" a three-judge court, as 28 U.S.C. § 1253 specifies (emphasis added):

> [A]ny party may appeal to the Supreme Court from an order granting or denying . . . any interlocutory . . . injunction in any . . . suit . . . *required by* any Act of *Congress* to be heard by a district court of three judges.

This "congressional-Act requirement," as it will be referenced, is met in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), § 403(a), 116 Stat. 113-14, providing special procedures for constitutional challenges seeking "declaratory or injunctive relief." Section 403 contains an election provision and the congressional-Act requirement.

The election provision is in (d)(2), providing that, for cases filed in 2007 or later, "the provisions of subsection (a) shall not apply to any actions described in such section unless the person filing such action elects such provision to apply to the action." Citizens United elected this "BCRA option," automatically engaging the congressional-Act requirement.

The congressional-Act requirement is in subsection (a)(1), which requires that the case shall be filed in the D.C. district court "and *shall* be heard by a three-judge

court convened pursuant to section 2284 of title 28, United States Code" (emphasis added).[1] Given this congressional-Act requirement for a three-judge court, this Court plainly has jurisdiction.

The FEC asserts that the word "required" may be lifted from its context and governed by either (a) "an[] Act of Congress" or (b) an act of a party, i.e., the "requir[ing]" in § 1253 can be either (a) what *Congress* did by requiring a three-judge court where the BCRA option is elected or (b) what *Citizens United* did by electing the BCRA option.

As to the first option ("required by . . . Congress"), the FEC acknowledges that "once appellant elected [the BCRA option], BCRA 'required' that a three-judge

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[1]Subsection (a) also requires expedition and advancement on the docket and direct appeal of "final decision[s]." "Final decision" is the term of art in 28 U.S.C. § 1291, specifying the cases for which that statute authorizes jurisdiction for courts of appeals, so BCRA merely indicated that such appeals go instead to this Court, as happened in *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*"), and *Davis v. FEC*, No. 07-320 (oral argument set for April 22, 2008).

There was no need to specify in BCRA that interlocutory orders would be directly appealed because the congressional-Act requirement of a three-judge court in BCRA § 403 automatically triggered direct appeal to this Court under 28 U.S.C. § 1253. Courts of appeals have no jurisdiction of interlocutory orders "where a direct review may be had in the Supreme Court." 28 U.S.C. § 1292.

court be convened to decide this case." MDA 2 n.1. This properly focuses on what Congress did.

As to the second option ("required by . . . [a party]"), the FEC argues that "[t]his case was not 'required' to be decided by a three-judge court insofar as appellant could have presented its constitutional claims to a single-judge court." *Id.* This erroneously focuses on what Citizens United did.

"Required" is not a free-floating term. It has a governing context. In the phrase "suit . . . required by . . . Congress . . . ," 28 U.S.C. § 1253, the verb "required" is in the passive voice. In the active voice, the phrase would be "Congress required the suit" (to be heard by a three-judge court), making clear that Congress is the controlling actor. In the passive voice, "suit" becomes the subject and "Congress" is demoted to a prepositional phrase, but the focus of the phrase is still on what *Congress* required.

So in interpreting § 1253, "required" is governed by both the "suit" and "Congress." What is "required" by the "suit" is what is "required by . . . Congress." According to § 1253, if the "suit" (based on Congressional action) and "Congress" require a three-judge court, then the analysis is ended and there is jurisdiction.

Nowhere in § 1253 is there any mention of any "party" or "plaintiff." "Party" is neither the passive-voice subject nor the active-voice subject of "required." Nor is "party" a direct object or part of a prepositional phrase related to "required." The concept of a party "requir[ing]" anything neither appears in § 1253 nor controls its authorization of jurisdiction. The FEC's effort to read "party" into § 1253, as a substitute for

"suit" or "Congress" must be rejected as an illegitimate effort to rewrite the statute.

Citizens United is unable to "require[] by an[] Act of Congress" that there be a three-judge court. Citizens United had no control over what Congress required in BCRA § 403. The only "requir[ing]" that counts in § 1253 is the "requir[ing]" done by Congress. So Citizens United's election to avail itself of the BCRA option is not a "requir[ing]" that is cognizable in § 1253. If "a *suit* [is] required" to be heard by a three-judge court "*by an[] Act of Congress*," such as BCRA § 403, then § 1253 is satisfied and this Court has appellate jurisdiction. This is such a case.

The use of "required" in § 1253 is simply descriptive of situations in which "an[] Act of Congress" has provided that cases be considered by three-judge courts. *See* Eugene Gressman et al., *Supreme Court Practice* 102-17 (9th ed. 2007) (collecting statutes, including BCRA) [hereinafter *Practice*]. It was not the creation of a new class of "required," versus "permissive," three-judge courts to be determined by whether a party had any option other than to bring a challenge in a three-judge court.

The synonymous phrase "required by Act of Congress" appears in 28 U.S.C. § 2284, under which BCRA § 403(a)(1) requires that a three-judge court be convened. Section 2284 provides that "[a] district court of three judges shall be convened when otherwise required by Act of Congress [and in certain apportionment cases]." That statute required the forming of a three-judge panel in the present case, just as it did in *WRTL II*, 127 S. Ct. at 2661, because of the congressional-Act requirement at BCRA § 403(a)(1) ("shall be

heard by a three-judge court convened pursuant to [§ 2284]"). Although the FEC fails to propose it, the same construction of "required" that it seeks to impose on § 1253 would also have to be imposed on § 2284, i.e., the requisite "requir[ing]" would not be limited to an "Act of Congress," but would include the interpolated "act of a party." That interpolation would yield the nonsensical result that Congress authorized the election of the BCRA option, which requires a three-judge court under § 2284, but Congress intended that no three-judge court could convene under § 2284 because the *party* was not "*required*" to elect the BCRA option. The FEC did not challenge the convening of a three-judge court below, indicating that it does not really believe that "required by Act of Congress" also means "required by act of a party."

Three-judge courts and direct appeal have been established as a mechanism for dealing carefully and expeditiously with issues that Congress thought especially important. A three-judge panel (with one court of appeals judge) improved the likelihood that a case would be correctly decided and allowed the elimination of an intermediate panel of three judges before review by this Court. Over time, some of these provisions have been repealed because they were deemed to have outlived their originally-perceived usefulness. *See Practice* 90-91 (collecting repealed provisions). But in BCRA, Congress recognized that it was dealing with core political speech touching on the most foundational elements of self-government by a sovereign people and so "required" that all initial cases filed under BCRA be heard by three-judge courts. It also "required" that the BCRA option would be fully avail-

able to subsequent plaintiffs electing it. In BCRA § 403, Congress specifically provided for direct appeal for "final decisions," but it did not need to do so with respect to a denial of a preliminary injunction because § 1253 clearly provided for such a direct appeal, given Congress' three-judge court requirement in BCRA § 403(a)(1). Given the repeal of many direct appeal provisions, "the coverage of the surviving three-judge court statutes is so narrowly defined as to make a restrictive interpretation [of § 1253] unnecessary and, at least in some circumstances, inconsistent with the intent of Congress." *Practice* 102.

So § 1253 was simply describing a class of cases subject to direct appeal. It was not setting up a class of "required" three-judge cases to be distinguished from those that are merely "permissive"—based on some party election not mentioned in § 1253. Nor is there any evidence that when Congress enacted BCRA § 403 it intended to impose on the federal courts the necessity—every time appellate authority was invoked under § 1253—of determining whether the three-judge court below was really "required" by Congress or merely "permitted" by Congress. The FEC's creative reading of "required" reads into § 1253 just such a distinction, which is wholly without authority and violates the plain language of § 1253.

Moreover, the FEC's attempted substitution of "party" for "Congress" as the subject of who does the "requir[ing]" in § 1253 would yield a curious result if the FEC itself were appealing. Suppose that the district court had granted Citizens United a preliminary injunction and the FEC had appealed that. Where would it go?

Of course, as shown above, since the three-judge Court was "required by an Act of Congress," BCRA § 403(a)(1), this Court would have jurisdiction under § 1253. But the FEC argues that the subject of "required" here is not Congress but Citizens United. To be consistent, the FEC would have to decide that since Citizens United was not "required" to elect the BCRA option, then § 1253 provided this Court no jurisdiction. So the FEC would have to appeal to the D.C. Circuit.

Of course, the D.C. Circuit would likely look at § 1253 and see that *Congress* is supposed to do the essential "requir[ing]," not any *party*, and would dismiss the appeal because its own jurisdictional statute, 28 U.S.C. § 1292, denies it jurisdiction "where a direct review may be had in the Supreme Court."

This is what happened in an attempted appeal of the denial of a preliminary injunction to the D.C. Circuit early on in *WRTL II*. 127 S. Ct. 2652. For the Court's convenience, the unpublished opinion in *Wisconsin Right to Life v. FEC*, No. 04-5992, 2004 WL 1946452 (D.C. Cir. Sep. 1, 2004) (per curiam), is appended. WRTL sought an expedited appeal of its preliminary injunction denial by a three-judge court and an injunction pending appeal. Responding to the FEC's motion to dismiss for lack of jurisdiction, the D.C. Circuit court noted that its jurisdiction would come from 28 U.S.C. § 1292, which precluded it "'where a direct review may be had in the Supreme Court.'" App. at1a (emphasis and citation omitted). Turning to 28 U.S.C. § 1253, the circuit court noted that § 1253 provided jurisdiction to the Supreme Court (where Congress had required a three-judge court) "'[e]xcept as otherwise provided by law.'" App. at 2a (emphasis and

citation omitted). The circuit court noted that "BCRA says nothing about judicial review of interlocutory orders and thus does not 'provide[] by law' that a party cannot appeal denials of such orders to the Supreme Court." App. at 2a. The circuit court dismissed the appeal "because BCRA does not preclude Supreme Court review of the appellant's appeal, § 1253 permits it, and § 1292 thus does not authorize review by this court." App. at 2-3a.

So if the FEC were appealing the grant of a preliminary injunction to the D.C. Circuit, that court would surely dismiss the case for lack of jurisdiction. Yet the FEC insists that Citizens United should have gone there because the D.C. Circuit would be persuaded by the FEC's flawed argument that when Congress in § 1253 specified that *Congress* must "require[]" a three-judge court it really meant that a *party* must "require[]" it.

Perhaps the FEC would argue that *it* should be able to appeal the grant of a preliminary injunction to this Court because it had no say in whether Citizens United elected the BCRA option. That would be inconsistent with the FEC's argument that the three-judge court was "required" by Citizens United in such a way that § 1253 precludes jurisdiction. And it would require yet another criterion to be read into § 1253, i.e., that "required" is established by party election, except in the case where a party has no election. That is a lot to read into a jurisdictional statute that is clear in its criterion that *Congress* must require the three-judge court, not a party. Section 1253 authorizes no such creative rewriting.

Section 1253 is clear. *Congress* must "require[]" the three-judge court. In BCRA § 403(a)(1), Congress did that. The criterion is met. This Court has jurisdiction.

II. Sound Policy Supports Jurisdiction.

There are good reasons why this Court should have and exercise jurisdiction. *WRTL II* recognized that preliminary injunctions serve a vital function in the First Amendment context. This function was set out in the *Jurisdictional Statement*, both in the Introduction, JS 1, and Part I, JS 15-16, so it need not be fully restated. But it should be noted that in many free speech contexts, as here, the denial of a preliminary injunction forever slams the window on the unique opportunity to speak for which injunctive relief is sought. *See* JS 13-14 (outlining Citizens United's lost opportunities if a preliminary injunction is denied)). Given the denial of timely injunctive relief to WRTL in *WTRL II*, 127 S. Ct. at 2661, and the denial of relief by the court below in the present case, it is clear that there needs to be a mechanism for expeditious appeal of preliminary injunction denials in order to protect free speech.

Congress recognized that BCRA operates in an especially-sensitive area that requires the special procedures provided in BCRA § 403(a) for cases seeking "declaratory or injunctive relief." BCRA requires advancement on the docket and expedition, specifies a district court that has considerable experience with campaign-finance law, requires a three-judge court so that multiple judges (including one appellate judge) can consider the issues in the first instance, and provides for expeditious, direct appeal to this Court,

bypassing the court of appeals. But even those procedures are an inadequate remedy to safeguard core First Amendment rights in the sensitive, highly-protected areas regulated by BCRA if the appeal to this Court is limited only to "a final decision" by the three-judge court. When preliminary injunctions are required in this unique context, wending through yet another court is too time-consuming.

BCRA's uniqueness not only demonstrates why cases in its subject area require the special procedures, including direct appeal, but it also should alleviate any institutional concern that this Court may have about being required to deal with numerous preliminary injunction appeals. Congress no longer requires three-judge courts in many contexts, resolving prior concerns about inundation.[2] But Congress has deemed the BCRA context to specially require both a three-judge court and the other special procedures, including direct appeal. Not many cases will fall within the scope of BCRA and also require consideration of a preliminary injunction on appeal. This Court has several years of

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[2]As set out in *Practice*, at 101:

> Although a few three-judge court statutes are still on the books, not many cases now arise under them, and the Court can no longer be said to be severely overburdened by the few appeals from three-judge district courts that are now being filed and heard. In the 1981 Term only 12 such appeals were acted upon by the Court, of which 4 were accepted for oral argument; in the 1990 Term, the numbers were 9 and 3; in the 1999 Term, the numbers were 8 and 2; and in the 2004 [T]erm the numbers were two and zero.

experience with BCRA (2002) in place from which it can readily determine that this is an accurate description. And with *McConnell*, 540 U.S. 93, *WRTL II*, 127 S. Ct. 2652, and, shortly, *Davis v. FEC*, No. 07-320, already decided, the number of BCRA provisions that might be challenged in this Court has been reduced.

Finally, if this Court provides clarifying standards on preliminary injunctions in this sensitive First Amendment context, along the lines that it provided for as-applied challenges in *WRTL II*, 127 S. Ct. at 2666-67, then in future cases the district court below should be more protective of First Amendment rights than it was in *WRTL II* and the present case. So exercising jurisdiction in this case should reduce the need for future appeals of preliminary injunction denials. And perhaps another WRTL would not have to wait years to gain recognition for its right to speak at a time when it really mattered—an opportunity forever lost without a preliminary injunction.

Conclusion

For the foregoing reasons, this Court has jurisdiction. But if this Court decides that it does not, Citizens United asks the Court to vacate the order appealed from and remand the case to the district court with instructions to enter a new order, so that Citizens United may perfect an appeal there.[3]

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[3]The time for noticing appeal in the D.C. Circuit has expired. In a similar situation, where this Court determined that it lacked jurisdiction under 28 U.S.C. § 1253 because "a three-judge court was improperly convened," this Court vacated judgment and remanded for "a fresh decree" so

(continued...)

Respectfully submitted,

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[3](...continued)
appellant could timely appeal to the court of appeals. *Moody v. Flowers*, 387 U.S. 97, 102 (1967). *See also Gonzalez v. Automatic Employess Credit Union*, 419 U.S. 90, 101 (1974) (absent jurisdiction, court remanded for fresh order permitting timely appeal).

Appendix

Opinion of U.S. Court of Appeals,
District of Columbia Circuit

[Filed Sep. 1, 2004; 2004 WL 1946452 (C.A.D.C)]

United States Court of Appeals,
District of Columbia Circuit

WISCONSIN RIGHT TO LIFE, INC., Appellant
v.
FEDERAL ELECTION COMMISSION, Appellee
No. 04-5292.

Sept. 1, 2004.

[Westlaw counsel listing omitted.]

BEFORE: HENDERSON, ROGERS, and GARLAND, Circuit Judges.

ORDER

PER CURIAM.

*1 Upon consideration of the emergency motion for injunction pending appeal, the motion to expedite disposition, the combined opposition thereto, and the reply; the motion to dismiss appeal and the response thereto, it is

ORDERED that the motion to dismiss be granted.

This court's jurisdiction over this appeal, if it exists, must come from 28 U.S.C. § 1292 (2000). That statute vests the courts of appeals with appellate jurisdiction over "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying,

refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, *except where a direct review may be had in the Supreme Court." Id.* (emphasis added). Thus, whether this court has jurisdiction depends on whether the appellant may appeal directly to the Supreme Court from the three-judge court's denial of its request for a preliminary injunction. That inquiry is governed by 28 U.S.C. § 1253 (2000), which states that *"[e]xcept as otherwise provided by law,* any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." *Id.* (emphasis added). Thus, whether the Supreme Court has jurisdiction over the appeal from the three-judge court's denial of the request for a preliminary injunction depends on whether another law provides an exception to the authorization of § 1253. The only law to which the appellant points is the Bipartisan Campaign Reform Act (BCRA) of 2002, § 403(a)(3), 2 U.S.C.A. § 437h note (West Supp. 2003), which states that "[a] *final decision in the action* shall be reviewable only by appeal directly to the Supreme Court of the United States." *Id.* (emphasis added). BCRA says nothing about judicial review of interlocutory orders and thus does not "provide[ ] by law" that a party cannot appeal denials of such orders to the Supreme Court. Accordingly, because BCRA does not preclude Supreme Court review of the appellant's appeal, § 1253 permits it, and § 1292 thus does not authorize review by this court. It is

FURTHER ORDERED that the emergency motion for injunction pending appeal and motion to expedite disposition be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C.Cir. Rule 41.

C.A.D.C.,2004.
Wisconsin Right to Life v. Federal Election Com'n
Not Reported in F.3d, 2004 WL 1946452 (C.A.D.C.)

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